Additionally, under co-ownership, broadcast stations could use newspaper reporters' expertise to improve coverage of national stories. For example, broadcast stations could localize the coverage of national issues by including interviews or comments from local officials addressing the impact of these issues at the local level.[58] This benefit could be extremely useful during political elections, with reporters conducting broad coverage in both Washington and at the local level and the newspapers and broadcast stations improving their polling capabilities. Companies will need such coverage in order to remain competitive in today's growing media marketplace. This type of coverage would help educate communities and increase viewpoint diversity.

The increased resources resulting from combined ownership could also result in better use of developing technology to provide new and expanded services. For example, many newspapers and broadcast stations maintain web sites updated daily with current local, national, and international news in all areas including politics, the economy, sports, and entertainment. If these entities were co-owned, they could have joint or linked web sites to allow the consumer to achieve faster access to a broader range of news topics and depth of coverage, allowing the entities to compete better with other services providers. Microsoft Corp. and the National Broadcasting Co. (NBC) have combined to create a cable news network that provides viewers with access to news and information via television or computer and the ability to interact with

[58] Tribune Co.'s Request for a Permanent Waiver of Section 73.3555(d)(3) of the Commission's Rules to Permit Joint Ownership of the Ft. Lauderdale Sun Sentinel and Station WDZL(TV), Miami, FL at 18.

news reporters.[59] Co-owned local newspapers and stations could develop similar services to provide viewers and readers with additional news resources on the Internet or other media.

Technological advances will continue to advance synergies between newspapers and television. Several companies have developed "new media" centers, like Hearst's New Media & Technology division, to manage the company's growing interest in new media advances and interactive technologies. With the elimination of the cross-ownership rule, companies or departments such as these could expand their research to develop new technologies services that would further the public interest.

In summary, the economies of scale created through cross-ownership would produce increased competition among current market participants and new entrants as they compete more vigorously to distribute better news and information services and products.[60] In addition, the

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[59] While the Microsoft/NBC relationship is not an ownership one, and one might argue that co-ownership is unnecessary to create these types of joint ventures, it is essential to note that at the local level, the incentives – i.e., the resulting economic savings – to "join forces" would be not nearly as significant for joint ventures as it would be if the station/newspaper could be co-owned. Indeed, many joint ventures at the local level tend to be short-term in nature. In Hearst's own experience, New England Cable News, in which Hearst has an interest, recently joint ventured with the Boston Globe to report on hospice care. The products of this venture – extensive coverage in the Globe and a NECN documentary – were awarded with a Peabody Award. While there are benefits to short-term relationships – in the form of more in-depth news coverage – the longer-term economic and programming benefits that would accrue from co-ownership are lacking.

[60] Specific to the newspaper industry, associations between newspapers and broadcast stations would provide newspapers an additional opportunity to attract younger readers. Statistics indicate that the majority of newspaper readers are older adults. Only 48% of adults ages 18-34 read a paper daily. Facts About Newspapers at 7 (Broadcast industry statistics, however, indicate a much higher percentage of adults in these age brackets listen to the radio for their news and entertainment.) Through synergetic relationships created by cross-ownership, newspapers would be able to market themselves to younger TV/radio viewers. For example, with a newspaper/broadcast alliance, a newspaper could better promote its public interest and entertainment sections that might attract more readers. Both the newspaper industry and the Commission have an interest in helping newspaper readership grow in order to remain competitive in today's multi-media market.

resulting synergies and marketing relationships between co-owned newspapers and broadcasters would create a more level competitive playing field for these media against other media that are already permitted to take advantage of co-ownership.[61]

VII. The Commission Should Repeal the Newspaper/Broadcast Cross-Ownership Rule Because it is Unfairly Burdensome on the Newspaper Industry and it Severely Restricts the First Amendment Rights of Newspapers and Broadcasters.

A. In Light of the Relaxation or Repeal of Other Multiple Ownership Rules, the Current Newspaper/Broadcast Cross-Ownership Rule is Unduly Burdensome and Should be Repealed.

In FCC v. NCCB, the Supreme Court roundly rejected an argument that newspaper owners were unfairly singled out for more stringent treatment than other applicants for broadcast licenses due to the cross-ownership rule. The Court stated that the regulations were no more harsh in their treatment of newspaper owners than were regulations that were already in place that applied to owners of other media. "Owners of radio stations, television stations, and newspapers alike are now restricted in their ability to acquire licenses for co-located broadcast stations."[62]

While the Supreme Court's reasoning may have been valid in 1978, it is out-of-date in light of the recent relaxation of other multiple ownership rules. Indeed, as the newspaper/broadcast cross-ownership rule was the last to be promulgated, it has also yet to see

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[61] Under the Commission's rules, there are no restrictions on co-ownership between cable/radio; MMDS/broadcast; MMDS/telcos; online/cable; online/telco; online/broadcast; software provider/cable; software provider/telco; software provider/broadcast; telco/broadcast; telco/DBS; and DBS/broadcast. See also NAA Petition for Rulemaking at 39.

[62] NCCB, 436 U.S. at 801.

any relief. The result is that the newspaper/broadcast cross-ownership rule unfairly singles out newspaper owners.

The Commission began relaxing other multiple ownership rules in 1988 when it modified the radio duopoly rule to allow radio station owners to own multiple stations closer to each other than the previous rule allowed. It provided that radio stations could be owned jointly as long as their principal city contours did not overlap.[63] That provision was a modification of the previous standard, which banned radio "duopoly" ownership within a broader area. The one-to-a-market rule was also modified in 1988. The waiver policy under the rule was relaxed so that it was easier for owners of broadcast outlets in large markets to receive a waiver of the prohibition on owning television and radio stations in the same market.[64]

The Telecommunications Act of 1996 further loosened the regulations that govern multiple ownership of media outlets. The Act eliminated the cap on the number of radio stations that a single entity could own nationwide and established new, higher limits on the number of radio stations an entity could own in any given market. The Telecommunications Act of 1996 also abolished the numerical cap on television stations that could be held by a single owner, as long as an owner's total TV ownership did not cover more than 35% of the nation's TV households.[65] There were other deregulatory aspects of the bill including measures to allow dual

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[63] See First Report and Order (Amendment of Section 73.3555 of the Commission's Rules, the Broadcast Multiple Ownership Rules), 4 FCC Rcd 1723 (1988) ("First Radio Duopoly Order")

[64] See Second Report and Order (Amendment of Section 73.3555 of the Commission's Rules, the Broadcast Multiple Ownership Rules), 4 FCC Rcd 1741, 1741 (1989) ("One to a Market Order").

[65] See Telecommunications Act of 1996, Pub. L. No. 104-104 § 202 (1996).

networks, cable-broadcast cross-ownership, and cable-telephone company competition, as well as a further liberalization of the one-to-a-market waiver policy.[66]

As the communications market/industry has evolved to include more participants, the Commission and Congress have responded by loosening many of the multiple ownership rules and allowing new technologies and market forces to play a greater role. However, even as the Commission and Congress have acknowledged the new era by ushering in a wave of deregulation with respect to broadcast ownership rules, the newspaper/broadcast cross-ownership rule has remained intact and strictly enforced, an anachronism in a changed world.[67] To some extent the maintenance of the newspaper/broadcast rule results from the constraints imposed by Congress over the years restricting the Commission's ability to review or amend them.[68] However, it is particularly ironic that in 1998 the most restrictive cross-ownership rule in force impacts the newspaper industry, which itself uses no publicly-owned resource, such as frequency spectrum.

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66 Id.

67 The Commission continues to apply a very stringent waiver policy for the newspaper/broadcast cross-ownership rule that has remained unchanged since the Commission adopted the rule. Under this standard, the Commission has granted only three waivers in the past 23 years, and will do so only where (1) a licensee is unable to sell a station; (2) the only sale possible would be at an artificially depressed price; (3) separate ownership and operation of the newspaper and the broadcast station could not be supported in the locality; and (4) the purposes of the rule would be disserved by its application. See Fox Television Stations, Inc., 8 FCC Rcd 5341 (1993), aff'd sub nom., Metropolitan Council of NAACP Branches v. FCC, 46 F.3d 1154 (D.C. Cir. 1995); Field Communications Corp., 65 FCC 2d 959 (1977); Columbia Montour Broadcasting Co., Inc., FCC 98-114, released June 11, 1998.

68 This, of course, refers to the previous appropriations riders imposed by Congress until 1996.

B. The Cross-Ownership Rule Violates the First Amendment Rights of Newspaper Owners and Broadcasters.

In FCC v. NCCB, the Court held that the Commission's broadcast regulations fell into a different category of review because of their peculiar nature resulting from spectrum scarcity.[69] However, in light of the changes to the media market presented above, the spectrum scarcity argument on which Red Lion and NCCB were based is no longer valid and broadcasters should no longer be held to a different First Amendment standard. In a non-broadcast context, the courts have used the traditional intermediate scrutiny test to analyze whether a statute or regulation violated the First Amendment.[70] It is this traditional test which should also apply to the newspaper/broadcast cross-ownership rule.

1. Because the Scarcity Rationale is No Longer Viable the Newspaper/ Broadcast Cross-Ownership Ban Should Be Reviewed Under a Higher Scrutiny.

When the Supreme Court reviewed the newspaper/broadcast cross-ownership rule in NCCB, it did not address the standard of review for assessing whether regulations in the broadcast industry violate the First Amendment. Instead, the Court relied on the broadcast spectrum's "physical limitations" and found there was "nothing in the First Amendment to prevent the Commission from allocating licenses so as to promote the 'public interest' in diversification of the mass communications media."[71]

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69 See Red Lion Broadcasting v. FCC, 395 U.S. 367, 390 (1969).

70 See Rubin v. Coors Brewing Co., 514 U.S. 476 (1995).

71 NCCB, 436 U.S. at 799.

The NCCB Court respected and upheld the notion from Red Lion of a "limited broadcast spectrum."[72] According to the Red Lion Court, "[b]ecause of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium."[73] As a result, the Red Lion Court held the broadcast industry to a standard different from other industries, and found that the Commission did not violate the First Amendment when it required licensees to give suitable time to matters of public concern.[74] Yet, in Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 254-58 (1974), the Supreme Court, without discussing the Red Lion scarcity rationale, held that the right of reply in a newspaper context violated the First Amendment. Here, the Court focused on "the protection afforded . . . to the free expression of views," and the fact that the statute amounted to government intrusion, without any mention of the diversity concerns discussed throughout NCCB and Red Lion.[75]

In the years since the Supreme Court decided NCCB, the Commission has recognized that the scarcity rationale is no longer a viable basis for some of its regulations. In particular, the

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72 One of the first cases where the Supreme Court dealt with the idea of spectrum scarcity is United States v. Storer Broadcasting Co., 351 U.S. 192 (1956). In Storer, the petitioner argued that the Commission's multiple ownership rule, which limited the number of broadcast stations that a company could hold in order to "avoid overconcentration of broadcasting facilities," violated the Commission's mandate to act in the public's interest. Id. at 193. The Court held that it was in the public interest for the Commission to limit the number of stations a company can hold in order to maintain a proper concentration of control in the limited broadcast spectrum. Id. at 203.

73 Red Lion, 395 U.S. at 390.

74 Id. at 394.

75 Tornillo, 418 U.S. at 255 (quoting Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376, 391 (1973)).

Commission reassessed the fairness doctrine in 1985 and then eliminated it in Syracuse Peace Council, 2 FCC Rcd 5043 (1987). The Commission re-evaluated the fairness doctrine under the Red Lion scarcity rationale.[76] The Commission determined that the regulation did not further the public interest in diversity of viewpoints; it actually hindered broadcasters from covering controversial issues.[77] In reaching this decision, the Commission found that, even if spectrum itself is scarce, a variety of sources now allow for viewpoint diversity, making the fairness doctrine no longer necessary.[78] As a result, the Commission found that the doctrine contravened the First Amendment and indicated that the Red Lion scarcity rationale was no longer a viable analysis.

Even more pertinent to the newspaper/broadcast cross-ownership rule is the Court of Appeal's decision upholding the Commission on policy grounds. In Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C. Cir. 1989), the court denied a petition for review of the Commission's decision, finding that the Commission did not act arbitrarily or capriciously. Thus, the Court

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76 Syracuse Peace Council, 2 FCC Rcd at 5052 (citing Red Lion, 395 U.S. at 389).

77 Id. The Commission stated:

> We believe that the interest of the public in viewpoint diversity is fully served by the multiplicity of voices in the marketplace today and that the intrusion by government into the content of programming occasioned by the enforcement of the [fairness] doctrine unnecessarily restricts the journalistic freedom of broadcasters.

Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, 102 FCC 2d 143, 147 (1985) (hereinafter "Fairness Report"). See also supra section IV (discussing changes in communications industry and multiplicity of sources now available for expressing viewpoints).

78 Fairness Report, 102 FCC 2d at 147-8.

recognized that the Commission's decision to eliminate the fairness doctrine based on a review of the spectrum scarcity rationale was a permissible policy judgment.[79]

The court explained that it owed "great deference" to the Commission's decisions based on the public interest. The only question that concerned the court was whether the Commission acted arbitrarily or capriciously. The court found that it did not.[80] The court accepted the Commission's evaluation of the doctrine's overall effects on licensees, finding that complete factual support was not required.[81] It also affirmed the Commission's determination that the expansion in broadcasting capacity and availability of a multiplicity of media sources rendered the fairness doctrine obsolete.[82]

Hearst submits that the analysis and conclusions reached by the Commission and the Court of Appeals regarding the fairness doctrine are applicable to the newspaper/broadcast cross-ownership restrictions as well.[83] In the absence of a scarcity rationale the cross-ownership rule must be evaluated under a higher standard.[84]

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79 Syracuse Peace Council, 867 F. 2d at 660.

80 Id.

81 Id.

82 Id. at 661.

83 As noted in section VIIIA above, the fairness doctrine is not the only regulation that has been relaxed or eliminated since the 1980s based on the increase in media diversity. The Commission and Congress have also relaxed or eliminated a number of other ownership restrictions, based in large part on the competitive effects and increased diversity that new technologies have had on the scarcity argument.

84 See Tribune Co. v. FCC, 133 F.3d 61, 68-69 (D.C. Cir. 1998) (indicating what appears to be court's willingness to reassess the scarcity issue when issues are properly presented in rulemaking proceeding).

2. Under the "Intermediate Scrutiny" Test the Cross-Ownership Rule is Not Narrowly Tailored to Address a Substantial Government Interest.

When a regulation interferes with speech without any reference to the speech's content, courts apply intermediate scrutiny to determine whether the regulation complies with the First Amendment.[85] Under this standard, the regulation must be narrowly tailored to address a substantial government interest.[86]

A court would likely consider the cross-ownership ban to be content-neutral and, therefore, subject to this intermediate scrutiny test. In Turner Broadcasting System v. FCC, 512 U.S. 622, 642 (1994), the Supreme Court noted that the must-carry provisions of the Cable Act of 1992 applied to all operators, regardless of the content of a station's programming and, therefore, were content-neutral.[87] The newspaper/broadcast cross-ownership ban also imposes burdens unrelated to content. For example, a newspaper's editorial content does not affect whether it is eligible to own a broadcast station. Therefore, the newspaper/broadcast cross-ownership rule is likely a content-neutral regulation subject to intermediate scrutiny.[88]

Hearst does not dispute that the Commission's goals of promoting competition and diversity are substantial interests.[89] In today's media market, the Commission's regulation,

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85 Turner Broadcasting System v. FCC, 512 U.S. 622, 642 (1994).

86 Id. at 662.

87 Id. at 643.

88 These Comments presume the cross-ownership rule is content-neutral and, therefore, subject to intermediate scrutiny. Some argue, however, that the cross-ownership rule should be subject to strict scrutiny. NAA Petition for Rulemaking at 58-60. If the rule violates intermediate scrutiny, as Hearst contends, then it certainly violates strict scrutiny.

89 Notice of Inquiry at ¶ 28 (citing Second Report and Order, 50 FCC 2d at 1074).

however, is not narrowly tailored to address these interests. The Commission adopted the newspaper/broadcast cross-ownership rule without any conclusive evidence of harm; rather the rule was adopted primarily on the prospect that the rule would increase diversity.[90] Further, the Commission grandfathered numerous newspaper/broadcast combinations finding they did not pose a sufficient threat to diversity to warrant application of the rule. Without specific evidence that allowing an entity to publish and broadcast in the same market would substantially harm diversity, a court would have to engage in "speculation or conjecture," an unacceptable means to determine whether the ban survives intermediate scrutiny.[91] In addition, as the proposals presented below by Hearst Newspapers suggest, the Commission imposed a regulation in 1975 that, today, is more restrictive than necessary to advance its interest, thus failing to meet the intermediate scrutiny standard.

The courts now must take "special care" in assessing whether a blanket rule infringes on the First Amendment. In addition, as the basis for the scarcity rationale no longer exists, a regulation is no longer constitutional if it merely advances the state's interest. The regulation must be narrowly tailored to address the state's substantial governmental interest. The newspaper/broadcast cross-ownership rule is a blanket prohibition that restricts speech regardless of a content of that speech. In its current form and under today's circumstances which are considerably different than in 1975, the rule cannot withstand a constitutional analysis.

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[90] Id. (citing Second Report and Order, 50 FCC 2d at 1075). See also NCCB, 436 U.S. at 781, 797 (finding Commission goals and steps to promote diversity were rational without providing statistical evidence for the Commission's diversity concerns).

[91] See 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 507 (1996) (citing Edenfield v. Fane, 507 U.S. 761, 770 (1993)).

VIII. CONCLUSION

For the reasons set forth above, Hearst encourages the Commission to repeal the newspaper/broadcast cross-ownership rule. As presented for the record, both the level of diversity and competition in the multi-media marketplace have increased to such a level since 1975 that retaining the cross-ownership rule does not serve the FCC's stated public interest. In addition, the cross-ownership rule actually hinders diversity and competition and violates the First Amendment rights of the newspaper industry. Repeal of the newspaper/broadcast cross-ownership rule would be consistent with both the marketplace of the 1990s and the Commission's and Congress's recent treatment of other multiple ownership relationships.

Respectfully submitted,

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